

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this issue.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 10, 2013 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 29, 2013 she felt and heard a "pop" followed by immediate pain in her neck, back, and shoulder when she lifted a box weighing 20 pounds and placed it under a cart while in the performance of duty. OWCP accepted the claim for displacement of cervical intervertebral disc without myelopathy and sprain of ligaments of cervical spine. Appellant stopped work on June 29, 2013 and returned to modified duty on December 6, 2013. OWCP initially paid appellant intermittent wage-loss compensation benefits on supplemental rolls as of October 6, 2013 and on the periodic rolls as of June 1, 2014. On December 10, 2014 appellant underwent an OWCP-authorized C3-4 discectomy, arthrodesis, and interbody fusion. She returned to a full-time modified position on January 26, 2016.

On November 15, 2016 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated December 1, 2016, OWCP advised appellant of the specific evidence needed to establish entitlement to a schedule award. It afforded appellant 30 days to submit the necessary evidence.

OWCP received a January 5, 2017 report from Dr. Joshua B. Macht, a Board-certified internist, which evaluated appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and *The Guides Newsletter* Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).⁴ Dr. Macht indicated that appellant's preoperative testing showed evidence of right C5 radiculopathy, but the current radicular type of symptoms appellant described were nonverifiable and could not be related to a clear nerve root level by history. He found that appellant had a class 1, grade C impairment of the right upper extremity for mild sensory deficit at C5 which equaled one percent impairment. Dr. Macht also found that appellant had a class 1, grade C impairment of the right upper extremity for mild motor deficit at C5 which equaled four percent impairment. He combined those impairments and

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the October 17, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ A.M.A., *Guides* (6th ed. 2009).

concluded that appellant had five percent impairment of the right upper extremity due to her cervical injury with C5 radiculopathy.

In a February 2, 2017 report, Dr. James W. Butler, Board-certified in occupational medicine and serving as the district medical adviser (DMA), reviewed the medical evidence of record, including Dr. Macht's impairment report, and concluded that the evidence did not demonstrate a measureable, permanent impairment of a scheduled member or function of the body. His finding was based on the fact that Dr. Hugo Benalcazar, a Board-certified neurosurgeon, had indicated in his June 9, 2016 report that appellant's postoperative electromyogram (EMG) was negative and that she had normal sensory and motor function at the time of his examination. The DMA also found no evidence that appellant had nonverifiable radicular complaints.

By decision dated February 6, 2017, OWCP denied appellant's schedule award claim. It accorded determinative weight to the DMA's opinion that the evidence was insufficient to establish that she sustained a permanent impairment to a scheduled member or function of the body due to the accepted June 29, 2013 employment injury.

On February 10, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held telephonically on August 7, 2017. Counsel presented arguments regarding the evidentiary weight of the postoperative EMG. No new evidence was received.

By decision dated October 23, 2017, an OWCP hearing representative affirmed OWCP's February 6, 2017 schedule award decision. The hearing representative found that the DMA properly applied the information provided by Dr. Macht in his January 5, 2017 report to the standards set forth in the A.M.A., *Guides* to establish that appellant had no permanent impairment as a result of the June 29, 2013 employment injury.

On July 19, 2018 OWCP received counsel's request for reconsideration of its October 23, 2017 decision. Counsel asserted that OWCP's decision was "wrong as a matter of law because the DMA relied on postoperative EMG. He should have considered the presurgical findings." Counsel referenced law pertaining to the legal concepts of fact of injury, causal relationship, and disability. He also indicated that an October 30, 2013 report of Dr. John Augustin, Board-certified in internal medicine, was submitted in support of his reconsideration request.⁵

Evidence received following the October 23, 2017 hearing representative decision included medical authorization requests, copies of myofascial trigger point injection procedure notes, and evidence pertaining to an overpayment and job offers. Treatment reports, disability notes and duty status reports (Form CA-17) from Dr. Hugo Benalcazar, a Board-certified neurosurgeon, dated August 15, September 14, November 28, and December 8, 2017 were also received.

By decision dated October 17, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

⁵ The record does not contain an October 30, 2013 report from Dr. Augustin.

LEGAL PRECEDENT

Section 8128 (a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Initially, the Board finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an increased schedule award. Appellant did not claim a new award based on a new rating of permanent impairment for the accepted employment-related conditions.¹¹ Therefore, the issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), warranting further review of the merits of her claim.¹²

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Counsel asserted in his reconsideration request that OWCP's decision was "wrong as a matter of law" because the DMA relied on a postoperative EMG to determine that appellant had no sensory loss or motor

⁶ This section provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.606(b)(3).

¹⁰ *Id.*

¹¹ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019); *G.T.*, Docket No. 18-0158 (issued May 11, 2018).

¹² *Id.*

weakness of her upper extremities. Counsel, however, did not identify the legal precedent allegedly contravened or provide further explanation as to why presurgical findings were relevant in determining schedule award entitlement as of the time appellant reached maximum medical improvement. Consequently, appellant is not entitled to further review of the merits of her schedule award claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit such evidence in this case.¹³ The underlying issue in this case is whether appellant has established permanent impairment of a scheduled member or function of the body due to her work injury. The Board finds that the new evidence submitted is not relevant and pertinent as it does not contain new evidence addressing the current extent of appellant's employment-related permanent impairment.¹⁴ While counsel indicated that an October 30, 2013 report of Dr. Augustin was submitted in support of his reconsideration request, the record is devoid of such report. Appellant is therefore not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

On appeal counsel contends that OWCP's October 17, 2018 decision caused appellant to lose her appeal rights. Appellant, however, may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹⁶

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹³ See *R.R.*, Docket No. 18-0068 (issued May 16, 2019); *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹⁴ *E.L.*, Docket No. 18-1262 (issued March 11, 2019).

¹⁵ See *R.R.*, *supra* note 13; *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁶ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board